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SUPREME COURT, U. S.

IN THE
Supreme Court of the United States

October Term 1948.

No. 143.

ALVIN KRULEWITCH,

Petitioner.

AGAINST

UNITED STATES OF AMERICA,

Respondent.

PETITIONER'S REPLY BRIEF.

JACOB W. FRIEDMAN,
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In replying herein to the several arguments of the Solicitor General, we shall preserve the point or paragraph numbering employed both in our main brief and in the Government's brief.

1. Our first point raised the grave question whether it is proper in a case where there has concededly been an illegal search, when the source of evidence is duly challenged, to accept the prosecuting attorney's unsupported declaration of independent origin in place of independent proof. The Government admits that the trial judge did act on the prosecutor's assurance (p. 7). For example, when the prosecutor said the important Leyenson evidence was uncovered by a statement of the codefendant Sookerman and not from papers taken in the search, "though the court accepted this assurance (R. 391, 392), petitioner nevertheless stated that he thought the prosecutor should

be compelled to produce the Sookerman statement in question" (R. 393)—the language quoted being from the Government's brief (footnote, p. 8). On like objection elsewhere asserted (226-227), the trial judge again accepted the prosecutor's assurance. On this the Government states (p. 7), "Petitioner registered no further objection to the reception of the evidence in question." We believe the objection once raised suffices to preserve the point and that there is no requirement of a repetitious chant to the same effect. The Government concludes (pp. 8-9) that "the trial judge appropriately exercised his discretion in admitting the evidence after receiving the prosecutor's assurance that the evidence had an independent origin." Surely the substitution of assertion (and that by one of the advocates in the cause) for proof on a point of high constitutional right was not the intention in *Nardone v. U. S.*, 308 U. S. 338, nor is judicial discretion to be invoked in this fashion as a bludgeon of liberty.

2. We submit that the Government has completely failed to distinguish the controlling authority of *Alford v. U. S.*, 282 U. S. 687, 75 L. Ed. 624. To begin with, it is contended (p. 11) that the environment of the witness had already been developed aliter. We reiterate that in the *Alford* case, too, the witness had been examined at great length concerning his relation to the appellant and considerable latitude had been accorded in that examination (Opinion, p. 691). Nor is it of any importance that the Government was willing to furnish the witness's address confidentially to petitioner's counsel, for if it could not be revealed to the jury and made the foundation of cross-examination it was of no value. The emotional instability of the witness strikes us as being a most outlandish excuse for curtailing the rights of a defendant on trial for his liberty. Finally, the Government invokes the *Alford* case (Opinion, p. 694) as imposing upon the trial

court the duty of protecting a witness "from questions which go beyond the bounds of proper cross-examination merely to harass, annoy or humiliate." Unfortunately, the very language quoted is misleading, for in the next ensuing sentences Mr. Justice Stone declared:

"But no such case is presented here. The trial court cut off *in limine* all inquiry on the subject with respect to which the defense was entitled to a reasonable cross-examination. This was an abuse of discretion and prejudicial error."

In substance the attitude of the prosecution is mainly that petitioner was not prejudiced since, it is speculated, cross-examination along the line proposed might not have served further to discredit the witness. The best answer we can give to the proposed adoption of such a dangerous rule is to quote again from what Mr. Justice Stone said in the Alford case:

"To say that prejudice can be established only by showing that the cross-examination, if pursued, would necessarily have brought out facts tending to discredit the testimony in chief, is to deny a substantial right and withdraw one of the safeguards essential to a fair trial."

3. In connection with the erroneous reception in evidence over objection of declarations by a coconspirator after the conspiracy's termination and not in furtherance thereof, the Government makes no mention of the fact that at the time of the declarations the witness, the co-defendant and defendant had all been arrested (909-112, 575). Certainly under those circumstances any alleged conversation did not take place with the knowledge or acquiescence of the petitioner. Not only was the ruling contrary to the principles announced in *Fiswick v. U. S.*, 329

U. S. 217, 91 L. Ed. 196, but was admitted by the Circuit Court to be directly contrary to the Fifth Circuit holding in *Bryan v. U. S.*, 17 F. 2d 741. The *Bryan* case is not so much as mentioned in the Government's brief. Inasmuch as a conflict in the several circuits on a fundamental point of criminal procedure constitutes a characteristic basis for certiorari, it would appear that no effective answer can be made to the self-evident proposition that such a conflict exists.

4. The only attempted justification by the Government for the admission of Peacock's testimony as to his "understanding" of a conversation is a quotation from the opinion of the Circuit Court of Appeals that the witness was in effect stating the substance of what was said. However, this was not an instance of a witness who was unable to remember verbatim and therefore was requested to give the substance of a conversation. Actually his memory had been probed in this respect both on this trial and on previous trials *ad nauseam*, and it appeared that he actually had no understanding at all of any such alleged content of the conversation. The objectionable passage of his testimony, it is rather apparent, was nothing more than an irregular and clumsy attempt to introduce a prejudicial aspect without the slightest warrant in fact. The Government quietly ignores our discussion of the law wherein we seek to show that the overwhelming weight of judicial authority condemns such purported proof. Approval of such a ruling is a dangerous precedent for future prosecutions, and an inquiry on certiorari appears quite in order.

5. The Government asserts concerning the excluded testimony of the police detective, that the argument does not avail petitioner in the absence of proof or offer of proof that Johnston ever heard of petitioner's reporting

the matter (pp. 17-18). This contention is untenable. It is generally necessary that proof be submitted in a certain order, and if one component of it is excluded, the introduction of the remainder is superfluous. If petitioner was not allowed to offer proof of the complaint to the police officer, it is pointless to suggest that the excluded proof was insufficient. When the prosecution has scotched an effort to submit competent evidence, and the objection is not predicated on the absence of foundation, elementary fairness would dictate that the incompleteness of the proof should not thereafter be available to the Government in justification of the exclusion. It is almost needless to say that petitioner would have brought the knowledge home to Johnston had the opportunity been afforded.

6. In attempting to answer our point based on the faulty and misleading instructions relating to prostitution, the Government admits (p. 18) that the court "inadvertently defined prostitution too broadly"—a criticism of the charge which was likewise conceded by the Circuit Court of Appeals herein—but insists that petitioner's objection in this connection was directed against the submission to the jury of the personal immorality theory. It is quite true that we contend against the propriety of the submission of the lechery theory (in view of the unmistakable position taken by the prosecution and therefore litigated by petitioner to the exclusion of the other type of charge). What the Government completely overlooks is the refusal to charge as requested (738, 761) that the planning of the Florida trip as a mere incident of an immoral relationship theretofore existing was not sufficient basis for a conviction. Actually, it has been held in a number of cases such as *Fisher v. U. S.* (C. C. A. 4), 266 F. 667, *U. S. v. Grace* (C. C. A. 2), 73 F. 2d 294, and *Sloan v. U. S.* (C. C. A. 5), 287 F. 91, that the mere fact of illicit relations incidental to a trip does not warrant

prosecution under the statute. Thus in the *Sloan* case it was held:

"The mere fact that the journey from one state to another, if followed by such intercourse, when the journey was not made for that purpose formed in the state from which the transportation was made, cannot be regarded as a violation within the meaning of the act" (sic).

Likewise, in *Hunter v. U. S.* (C. C. A. 4), 45 F. 2d 55, the Court held:

"It was not intended to make unlawful a journey from one state to another, though followed by unlawful cohabitation, where the journey was not with a view to the accomplishment of that purpose."

The rule is well stated in *Yoder v. U. S.* (C. C. A. 10), 80 F. 2d 665:

"The government charged what the statute condemns, an interstate transportation for an immoral purpose. The government offered proof of such purpose. The defendant offered evidence that the trip was made for an entirely different purpose—a business reason. The jury should have been left to decide the issue. Instead the court charged in substance that whatever may have been the reason that brought about the trip, there must be a conviction if Yoder intended to have sexual commerce with her while away. No matter how vagrant and fleeting that intent, no matter that it did not influence in the slightest degree the decision to make the trip, still, the court charged, there must be a conviction if Yoder harbored the intent to continue his relations with her. This is substantial error."

The only authority to which the Government refers in this connection is *Caminetti v. U. S.*, 242 U. S. 470, 61 L. Ed. 442, wherein, as is correctly noted, the scope of the statute was extended to embrace both types of violation. Reference to this fundamental and admitted proposition is not to be regarded as a substitute for refutation of the entirely different points made. Moreover, the reiteration (p. 19) by the Government of the Circuit Court's speculation that the trial judge would doubtless have corrected the faulty definition had it been called to his attention, is hardly an answer. The refusal to charge as requested (738) was amply indicative that the trial judge entertained an erroneous view of the law, which he had proceeded to impart to the jury. It is placing too much of a burden upon the defendant to require that, in addition to a correct request, he must presume to rectify the judge's English and specifically revise an erroneous definition which is at variance with the request. Upon a consideration of the whole picture, it is evident that the situation required precise and clear exposition; that the instructions could not have failed to leave the jury in a Serbonian morass of confusion; that the petitioner made a reasonable effort to have the law clarified, but without success; that the Circuit Court and the Government alike find difficulty in extenuating the error on this vital aspect of the case; and that the resulting prejudice is plainly within the scope of this Court's ruling in *Bollenbach v. U. S.*, 326 U. S. 613, 90 L. Ed. 318.

7. The Government attacks our point relating to the refused instruction regarding the scrutiny and caution in the evaluation of Johnston's testimony and seeks to turn it into a point on the need for corroboration of the testimony of an accomplice. This was not our intention. We made it clear that we relied on *Speiller v. U. S.* (C. C. A. 3), 31 F. 2d 682, as holding it to be error to refuse an in-

struction that the jury should carefully scrutinize and consider with the utmost caution the testimony of a principal witness whose depravity and admitted low character justified such circumspection. Even without a request, the omission of such instruction has been held error. *Anderson v. U. S.*, 157 F. 2d 429. Nothing in *Caminetti v. U. S.*, 242 U. S. 470, 61 L. Ed. 442, holds otherwise, and there is no such corroboration in the instant case as to derogate from the square applicability of the instruction sought. Once again a situation is presented wherein the Second Circuit disagrees with the Third Circuit, and certiorari is a proper corrective.

8. The Government dismisses as a harmless irregularity the trial judge's bare affirmative answer that the jury might recommend leniency, placing chief reliance on the century-old authority of *State v. Gill*, 14 S. C. 410, while ignoring the host of cited cases to the contrary. No answer is attempted to our argument regarding the inevitable tendency of such an instruction to induce a compromise verdict. The Government also cites *Fillippon v. Albion Vein Slate Co.*, 250 U. S. 76, 63 L. Ed. 76, wherein, however, this Court reversed a conviction because supplementary instructions in writing were improperly transmitted to a jury when the jury should have been recalled, it being further said that erroneous rulings embodied in such instructions are presumptively injurious and furnish ground for reversal unless it affirmatively appears that they were harmless.

9. In answering our last contention, relating to irregularities affecting the composition and deliberations of the jury, the Government (p. 25) refers to "an extensive hearing before the trial judge." Of course, this consisted of nothing more than oral argument despite petitioner's insistence that the matter could not be disposed

of otherwise than through the testimony of witnesses on the sharp issues involved. It is also said that the Circuit Court of Appeals evidently did not construe its own order as contemplating any hearing in which witnesses would be called. This is scarcely an answer, for we are now challenging the correctness of the Circuit Court's ruling. In any event, to the extent to which the Circuit Court acted at all improperly, we submit, in ignoring the important point relating to the juror's concealment of past Government employment—it required the trial judge to act “after hearing and consideration” (795). We are aware of no case wherein mere argument of attorneys has been held to constitute a “hearing.” Without the actual testimony of witnesses and an opportunity to pass on their credibility there is nothing remotely resembling a hearing. The right to adduce evidence has frequently been held to be the essence of a hearing. *Wisconsin Telephone Co. v. Public Service Commission*, 232 Wis. 274, 287 N. W. 122; *State v. Milhollan*, 50 N. D. 184, 195 N. W. 292; *People v. Thompson*, 94 N. Y. 461. It is somewhat unusual for the prosecution to be urging as it does (p. 27) that the trial judge “was fully justified in accepting Lore's second affidavit as the truth.” It is generally a part of the stock in trade of prosecuting officials to denounce recantations as worthless, but evidently, when their own purposes are to be served, the recantations are exalted to the point of highest credibility. Incidentally, the lengthy discussion of this phase of the case in the Government's brief includes no mention of any reported case, from which we hope we may infer that our position as to the law is not challenged. It is particularly noteworthy, wholly apart from the numerous cases condemning the misconduct which we attack, that the Seventh Circuit held in *U. S. v. Sorcey*, 151 F. 2d 899, that a parallel situation necessitated a hearing. The fact that the Second

Circuit; also on this aspect of the case, takes a contrary stand furnishes a complete, independent ground for the issuance of certiorari.

For all of the foregoing reasons, as well as those stated in the petition and main brief, it is respectfully submitted that the application for a writ of certiorari should be granted.

Dated: New York, New York, September 25, 1948.

Respectfully submitted,

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